No. 81-2383

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

BOSWELL, INC. d/b/a BROADACRES,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee,

AND

BOSWELL, INC. d/b/a RENO COUNTY ADULT CARE HOME,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

MOTION TO DISMISS

Emily E. Cameron
(Counsel of Record)
Kansas Department of
Health and Environment
Forbes Field
Topeka, Kansas 66620
(913) 862-9360
Attorney for Appellee

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

MOTION TO DISMISS

Appellee in the above entitled case moves to dismiss the appeal on the follow-

ing grounds:

1. The federal question sought to be reviewed in Boswell, Inc. d/b/a Reno County Adult Care Home v. Joseph F. Harkins, Secretary of the Kansas Department of Health and Environment, 230 Kan. 610, 613, ... P.2d .... (1982), (Appellant's Jurisdictional Statement A9-A19) were neither properly raised nor expressly passed on by the courts of Kansas.
2. The appeal does not present a substantial federal question.

OPINIONS BELOW

In Appendix A, pages A1-A88 of this brief, appear the administrative opinions of the Kansas Department of Health and Environment which were subsequently appealed to the district court, affirmed by the Kansas Supreme Court, and are now

before this Court.

STATUTES AND REGULATIONS INVOLVED

Some provisions of Kansas and United States Constitutional issues involved in this case are set forth in Appellant's Jurisdictional Statement at pages 3 through 7. In this Appendix, at pages A89-A118, is found a copy of K.A.R. 28-39-33 (1978) and a copy of 42 C.F.R. § 442.251 (1979).

STATEMENT OF CASE

This is an appeal from two separate Kansas Supreme Court cases involving different nursing homes but the same parties. Counsel for appellant has joined these cases together in this appeal. Reno County, Kansas, owns both homes and leased them to Boswell, Inc. This lease expired

July 31, 1981.[1/]

Both homes were given the opportunity to correct numerous deficiencies, counseled on how to correct the deficiencies, but the operators failed to come into substantial compliance with nursing home statutes and regulations. The state has been involved in litigation with these homes since 1978. The administrative orders subject to this appeal were issued in 1980.

A. Reno County Adult Care Home

The Reno County Home was given a provisional license in November, 1978. On May 3, 1979, licensure and certification were denied. The facility had been given

[1/] This fact is not in the record. However, it is an exhibit in another case entitled Board of County Commissioners of Reno County, Kansas v. Boswell, Inc., No. 81-53,027 (Kan. App. 2d Apr. 22, 1982) (rev. denied Kansas Supreme Court June 28, 1982) (Record at T.12, Def. Exhibit 2).

eight months to comply and it had failed to do so. A hearing was held and the Order of Denial was upheld. The facility was given another opportunity to apply for a license, based on assurance of counsel, Robert Taylor, that the facility was in compliance. However, after resurvey, the facility was found still to be in noncompliance. Thus the license and certification were denied again. This most recent denial is the subject of this appeal.

After the license denial was upheld in the administrative hearing before the Kansas Department of Health and Environment, the department filed for medical receivership of this home pursuant to K.S.A. (1980 Supp.) 39-954. Receivership was granted and has subsequently been terminated. The County of Reno has leased the home to new operators who are cur-

rently operating the facility.[2/]

After the license denial by the state and during this same period the County of Reno filed an ejectment suit in Reno County District Court which has recently been affirmed by the Kansas Court of Appeals.[3/]

B. Broadacres Adult Care Home

Broadacres was denied a state license in October, 1978, based on a September

[2/] The facts in this paragraph are not in evidence. The information, however, is contained in In the Matter of the Appointment of a Receiver for the Reno County Adult Care Home Facility, an Adult Care Home of Hutchinson, Kansas, No. 80 C 79 (Reno County District Court) (This case, when it became a final judgment in District Court, was not appealed to the Kansas Court of Appeals).

[3/] This fact is not in evidence in this case. Board of County Commissioners of Reno County, Kansas v. Boswell, Inc., No. 81-53,027 (Kan. App. 2d April 22, 1982) (rev. denied Kansas Supreme Court June 28, 1982).

survey. Medicaid certification was denied in October, 1978. Hearings were held on the denial order and certification denial was upheld; however, the facility was given a ninety-day provisional license on the condition that the facility accept the guidance and recommendations of the state in correcting deficiencies.

In July, 1979, the reinspection showed the facility was still in non-compliance and the application for license was denied. However, no appeal was made to the State District Court on this denial. Based on assurances of counsel, Robert Taylor, the facility was allowed to apply for state licensure again. The facility was resurveyed and found to be in substantial noncompliance and this is the denial that is the subject of the appeal before the Court today.

The facility was closed on January 2, 1980, by order of the Kansas Department of Health and Environment. This order was not appealed to Kansas District Court. Boswell, Inc.'s lease was terminated in this facility at the same time it was terminated on the Reno County Adult Care Facility.

Federal constitutional issues were only raised in the Broadacres case in district court. Thus the Supreme Court of Kansas refused to review the constitutional issues in the Reno County case because they were not raised at the district court.

FEDERAL QUESTION NOT PROPERLY RAISED IN STATE COURT IN THE RENO COUNTY CASE

Jurisdiction of the Supreme Court to reexamine final judgment of state court

can arise only if record as a whole shows either expressly or by clear indication that the federal claims were adequately presented in the state system. Supreme Court Rule 16.1(b); Cardinale v. Louisiana, 394 U.S. 437 (1969). This was not done in the Boswell, Inc. d/b/a Reno County Adult Care Home v. Joseph F. Harkins, Secretary of the Kansas Department of Health and Environment, 230 Kan. 610, 613, ... P.2d .... (1982); (Appellant's Jurisdictional Statement A9-A19). There the court held:

> The appellant next raises issues of (1) unlawful delegation of legislative power by both the state legislature and the United States Congress and (2) denial of due process because duties imposed both as to licensure and certification are not set forth in terms definite enough to serve as a guide to those who have the duty imposed on them. An examination of the petition and brief submitted to the district court reveals these issues were not raised before the district court and consequently are not properly before this court. Ordinarily, an issue can not be raised for the first time on appeal.

> See, e.g., City of Salina v. Jaggers, 228 Kan. 155, 170, 612 P.2d 618 (1980); Fleming v. Etherington, 227 Kan. 795, 802, 610 P.2d 592 (1980); Malone v. University of Kansas Medical Center, 220 Kan. 371, 373-74, 552 P.2d 885 (1976); State v. Estes, 216 Kan. 382, 385, 532 P.2d 1283 (1975); Pierce v. Board of County Commissioners, 200 Kan. 74, 434 P.2d 858 (1967). (230 Kan. at 613, ... P2.d .... (1982) (Appellant's Jurisdictional Statement, pages A13, A14)

Appellant's failure to raise constitutional issues at district court denied the state court the opportunity to rule on the issues. As a consequence, the record is devoid of any evidence on this point in the Reno County case. These practical policy reasons, as well as appellant's failure to comply with the jurisdictional requirements of 28 U.S.C.S. § 1257(2) (Law. Co-op. 1977), justify dismissal of the appeal in regard to the Reno County Adult Care Home.

THE FEDERAL QUESTIONS ARE UNSUBSTANTIAL

Appellant has the burden of pleading the defects in the statute and regulations in the original pleading. Smaldone v. United States, 458 F. Supp. 1000 (D.C. Kan. 1978); 73 C.J.S. Public Administrative Bodies and Procedures, § 104(C) nn. 11 & 12. In this case the only K.A.R. specifically challenged was K.A.R. 28-39-33(A) and (C) (1978) as being unconstitutionally vague and overbroad. The only Kansas statute specifically challenged as being vague was K.S.A. (1980 Supp.) 39-931. No federal regulations were specifically challenged.

Appellant has cited cases dealing with state regulation of business and industry. These cases do not apply to this proceeding. This case deals with the

administration and regulation of state Medical Assistance Program for the indigent and the exercise of state police power in the licensure and regulation of nursing homes for the care of the aged and the infirm. Dandridge v. Williams, 397 U.S. 471, 484-487, (1970); 51 Am Jur 2d Licenses and Permits § 53 n. 1.

This is a civil proceeding, not a criminal matter. The courts use different standards for determining vagueness in civil cases. Arnett v. Kennedy, 416 U.S. 134 (1974).

Appellant suggests that such language as "acceptable policies and procedures" and "support sound resident care and personnel practices" are constitutionally vague. See: The Association of American Phy. And Sur. v. Weinberger, 395 F. Supp. 125, 138, affirmed 425 U.S. 975 (1975); see also

Augustin v. Quern, 461 F. Supp. 441 (1978).

The Kansas Supreme Court in regard to vagueness claims by appellants held:

> ... The few phrases or words specifically pointed out by the appellant have well understood common meanings and are neither vague nor indefinite. Boswell, Inc. d/b/a Broadacres v. Joseph F. Harkins, Secretary, Kansas Department of Health and Environment, 230 Kan. 738, 741, ... P.2d .... (1982) (Appellant's Jurisdictional Statement A6).

The record indicates that if and when a regulation of the Kansas Department of Health and Environment is unclear, the department provides consultation on what is necessary for compliance and that Boswell, Inc., received such consultation each time a survey was conducted. Seagram & Sons v. Hostetter, 384 U.S. 35, 49 rehearing denied 384 U.S. 967 (1966).

The violation asserted in K.A.R. 28-39-33(A)(1) (1978) is more explicitly set

forth at K.A.R. 28-39-33(A)(2)(3)(9)(10) (1978) and K.A.R. 28-39-33(J)(1)(8)(9) (1978). The violations asserted in K.A.R. 28-39-33(C)(1) (1978) are more explicitly set forth in K.A.R. 28-39-33(C)(2)(3)(4)(5)(6)(7) and (8) (1978). Furthermore, even if K.A.R. 28-39-33(A)(1) and (C)(1) (1978) were struck, this would not affect the outcome of this case since the violations asserted in K.A.R. 28-39-33(A)(1) and (C)(1) (1978) are repeated elsewhere in the administrative order with regulations using more specific language.

Appellant has no testimony in the record indicating he was unable to determine what was needed to comply. Instead the record is replete with plans of correction submitted by Boswell, Inc., informing the state of what they intended to do to comply. The state accepted

plans of correction, however, upon resurvey found that the corrections had not been completed. Appellant's contention that his client suffered harm because of his inability to comprehend the regulations set forth in K.A.R. 28-39-33 (1978) is totally devoid of merit.

Appellant's contention that K.S.A. (1980 Supp.) 39-931 is vague because it uses the standard of substantial compliance is totally without merit and lacks foundation in law. Seagram & Sons v. Hostetter, 384 U.S. 35, rehearing denied 384 U.S. 967 (1966); Cf. Opp. Cotton Mills v. Administrator, 312 U.S. 126, 142-46(1941); Bowles v. Willingham, 321 U.S. 503, 512-16 (1944).

The Due Process Clause prohibits only those classifications within the federal social welfare program that are "patently arbitrary classification[s], utterly

lacking in rational justification." Flemming v. Nestor, 363 U.S. 603, 611. (1960). Due process requirements are fulfilled in regulations which are reasonably related to this subject and are adopted in the interest of the community. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

Here, federal Medicaid regulation 42 C.F.R. § 442.251 (1979) requires certification can not be granted if the facility lacks a state license. This requirement is clearly not vague or outside the boundaries of permissible legislation.

The statute authorizing the promulgation of 42 C.F.R. § 442.251 (1979) is 42 U.S.C.S. § 1302 (1973). This statute has not been challenged by appellant and clearly gives Health and Human Services (formerly Health, Education, and Welfare)

authority to promulgate 42 C.F.R. § 442. 251 (1979). Appellant's argument that the Medicaid certification orders in the two cases under review are constitutionally infirm is clearly without merit.

In addition, the district court in both cases ruled the Medicaid certification denial could be based solely on K.A.R. 30-2-7 in effect as temporary regulation August 8, 1979, and K.A.R. 30-2-8 in effect as temporary regulation August 8, 1979. Boswell, Inc. d/b/a Broadacres v. Joseph F. Harkins, Secretary of the Kansas Department of Health and Environment (Reno County District Court May 19, 1981), (Appellant's Jurisdictional Statement page A21), Boswell, Inc. d/b/a Reno County Adult Care Home v. Joseph F. Harkins, Secretary of the Kansas Department of Health and Environment (Reno County District Court

October 28, 1980) (Appellant's Jurisdictional Statement page A24). Thus, there is no need to review whether federal Medicaid statutes and regulations are constitutionally infirm for whatever reason.

Appellant also contended there was unlawful delegation of legislative authority pursuant to K.S.A. 39-932 (1973). Appellant contended the last sentence of K.S.A. 39-932 (1973) constituted an unlawful delegation of authority. Even if that were true, the department has not established such a system and the appellant has not lost his license under such a system. In addition, the Kansas Department of Health and Environment has authority to promulgate rules and regulations pursuant to K.S.A. (1980 Supp.) 39-950.

Furthermore, if the last sentence of K.S.A. 39-932 (1973) is void for being unconstitutional delegation of authority,

that sentence alone could be struck leaving the statute intact. United States v. Jackson, 390 U.S. 570 (1968).

In addition, appellant at no time in state court specifically alleged that K.S.A. 39-932 (1973) was unconstitutional based on federal law.

Appellant has failed to allege at any time in his pleadings why he believes 42 U.S.C.S. § 1396a (1980) to be an unlawful delegation of authority and thus lacks standing to have the issue considered by this Court. 458 F. Supp. 1000. In addition, the decision of the State Supreme Court in regard to Medicaid certification in both cases before this Court can be sustained by utilizing 42 C.F.R. § 442.251 (1979) which was promulgated based on 42 U.S.C. § 1302 (1973). Thus there is no need in this case to consider the constitutionality of 42 U.S.C. § 1396a (1980).

Appellant's equal protection argument is without merit. The Supreme Court held in Boswell, Inc. d/b/a Reno County Adult Care Home v. Joseph F. Harkins, Secretary of the Kansas Department of Health and Environment, 230 Kan. 610, 614, ... P.2d .... (1982):

> The act recognizes that deficiencies may occur but contemplates that a facility will not operate on a provisional license for more than one year at a time. The provisions of the act equally apply to all the nursing home facilities in the state. Assuming for purposes of this argument only, that the KDHE has erroneously granted provisional licenses in the past, such erroneous action would not prevent enforcement of the statute in this act, Warburton v. Warkentin, 185 Kan. 468, 477, 345 P.2d 992 (1959), and would not constitute a denial of equal protection of the law. Past agency error does not abrogate enforcement of the law. (Appellant's Jurisdictional Statement, page A15)

In addition, the State Supreme Court found in Boswell, Inc. d/b/a Reno County Adult Care Home v. Joseph F. Harkins, Secretary of the Kansas Department of Health

and Environment, 230 Kan. 610, 614, 615, ... P.2d .... (1982):

> ... We note that, for the six months preceding the application made in October, 1979, facility was operating on a provisional license the purpose of which was to provide a grace period in which to correct deficiencies. Yet, the hearing officer who filed his report May 7, 1980, found evidence to support numerous violations reported in the November 15, 1979, field survey and found repeated violations of five regulations. K.S.A. 39-931a (b) provides in pertinent part:
>
> > "Pursuant to K.S.A. 39-931, the licensing agency may deny a license to any person and may suspend or revoke the license of any person who: (1) Has willfully or repeatedly violated any provision of law or rules and regulations adopted pursuant to Article 9 of Chapter 39 of the Kansas Statutes Annotated."
>
> The act clearly does not countenance violations nor envision perpetual grace periods in which to correct them. (Appellant's Jurisdictional Statement, pages A15-A16).

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

If this Court treats appellant's request as a Petition for Writ of Certiorari only federal questions passed upon by the state supreme court can be considered by this Court. Wilson v. Cook, 327 U.S. 474 (1946). In this case, as previously stated, only in the Broadacres case were the constitutional issues raised at the lower court and ruled on by the state supreme court. The constitutional issues must be raised properly before the U.S. Supreme Court can rule on them. Webb v. Webb, 101 S. Ct. 1889 (1981). Stembridge v. Georgia, 343 U.S. 541, 547 (1952).

Upon examination of Supreme Court Rule 17, it is clear that appellant's Jurisdictional Statement does not encompass any of the reasons set forth in Rule

17 for granting certiorari. The Kansas Administrative Regulations in effect at the time of denial of license have been repealed as of January 7, 1982. There are no special circumstances that warrant consideration of these repealed regulations by the U. S. Supreme Court. In District of Columbia v. Sweeney, 310 U.S. 631 (1940), the Court ... "denied [Petitioner's Writ of Certiorari] in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance." The issues under review in this case do not deal with issues that are in conflict with decisions of other courts and are based solely on Kansas law. Neither does the case deal with an important question of federal law which has not been resolved and should be settled by this Court. Nor has there been a showing

by appellant that the Kansas Supreme Court in writing its judgment so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of the Supreme Court's supervisory power.

Another reason for not hearing the request is that appellant could not be returned to the status quo. His lease has expired and another party is operating the nursing home on the premises. Furthermore, as was set forth in the section on lack of substantial federal question, appellant's constitutional contentions are meritless.

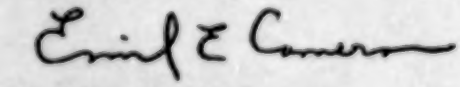
CONCLUSION

For the foregoing reasons, I respectfully submit that the questions presented by appellant are clearly insubstantial and that the case should be dismissed.

Treating the appeal papers as a petition for a writ of certiorari should be denied because there are no special and important reasons for the case to be heard.

At the very least, the Court lacks jurisdiction to review Boswell, Inc., d/b/a Reno County Adult Care Home v. Joseph F. Harkins, Secretary of the Kansas Department of Health and Environment, 230 Kan. 610 .... P.2d .... (1982) (Appellant's Jurisdictional Brief pages A9-A19) because the federal question was not timely or properly raised at the lower court.

Respectfully submitted,



Emily E. Cameron
Attorney for Appellee
Kansas Department of
Health and Environment
Forbes Field
Topeka, Kansas 66620
(913) 862-9360

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